

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 21ST DAY OF JUNE 2018

PRESENT

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MRS.JUSTICE S.SUJATHA

I.T.A. No.506/2017

BETWEEN :

1. THE PR. COMMISSIONER OF INCOME TAX CIT(A)
5TH FLOOR, BMTC BUILDING,
80 FEET ROAD, KORAMANGALA,
BENGALURU-560095

2. THE DEPUTY COMMISSIONER OF
INCOME TAX CIRCLE-11 (1),
PRESENT ADDRESS ACIT, (C-2(1)(1)
2ND FLOOR, BMTC BUILDING,
80 FEET ROAD, KORAMANGALA,
BENGALURU-560095

...APPELLANTS

(BY SRI K.V.ARAVIND, ADV.)

AND :

M/s DECCAN MINING SYNDICATE PVT. LTD.,
S-7, 2ND FLOOR, ESTEEM ARCADE,
NO.26, RACE COURSE ROAD,
BENGALURU-560001
PAN:AAACD 7081R

...RESPONDENT

THIS INCOME TAX APPEAL UNDER SECTION 260-A OF
INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED
29.12.2016 PASSED IN C.O.NO.78/BANG/2014, FOR THE
ASSESSMENT YEAR 2010-2011 PRAYING TO I. FORMULATE THE

SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. II.ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, BENGALURU IN C.O.NO.78/BANG/2014 DATED 29.12.2016 CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER AND CONFIRMING THE ORDER PASSED BY THE ASST. COMMISSIONER OF INCOME TAX, CIRCLE-2(1)(1), BENGALURU & ETC.

THIS APPEAL COMING ON FOR ORDERS, THIS DAY, **Dr. VINEET KOTHARI, J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

Mr. K.V.Aravind, Adv. for Appellants - Revenue

This Appeal has been filed by the Revenue under Section 260-A of the Income Tax Act, 1961 ['Act' for short], raising certain alleged substantial questions of law arising from the Order of the learned Income Tax Appellate Tribunal dated **29.12.2016** passed in **Cross Objection No.78/Bang/2014 in I.T.A.Nos.782 to 785/Bang/2014** in '**M/s. Deccan Mining Syndicate Pvt. Ltd., v. Deputy Commissioner of Income-tax**' for Assessment Year **2010-11**, setting aside the penalty imposed on the Respondent-Assessee by the Assessing Authority.

2. The reasons assigned by the learned Tribunal in the impugned Order are quoted below for ready reference:

*“14. Thus, **applying the ratio laid down by the Hon’ble Supreme Court in the case of Reliance Petro Products Pvt. Ltd. (supra)** and also the decision of the Hon’ble jurisdictional High Court in the case of **Manjunatha Cotton & Ginning Factory (supra)**, since the present case in the absence of any finding by the AO that the explanation filed in response to show cause notice for levy of penalty is false or not bona fide and in absence of any conclusive evidence brought by the AO, we are of the considered opinion that mere addition to returned income does not result in automatic levy of penalty. Therefore, **we uphold the reasoning of the CIT(A) in deleting penalty in respect of addition made of excess claim u/s 10B of the Act.***

15. As regards excess claim on account of computation from export turnover of telecommunication charges, freight and travelling charges etc., the method of computation of done

*by the assessee-company is supported by the decision of the Hon'ble jurisdictional High Court in the case of **CIT vs. Tata Elxsi (349 ITR 98)**, the addition is made on mere debatable point of law. So, no penalty is leviable. Therefore, we do not find any justification in the grounds of appeal filed by the revenue and are accordingly rejected. The revenue's appeals are dismissed.*

16. Now we shall deal with the assessee-company's cross objections. Since all the cross objections relate to the same issue, we proceed to dispose of the same in the common order.

17. The cross objections are directed against the findings of the CIT(A) confirming levy of penalty **in respect of addition made on excess stock found**. Addition was made by the AO on excess stock based on information filed by the assessee-company vide letter dated 04/06/2010. It is not the case of the AO that excess stock was as a result of purchase made outside books of account. Excess stock, if any, is only on account of wrong entries in the books of account. As a result of this, if there is higher stock than shown in the books of accounts as at the end of the particular year, same should be

allowed as opening stock of the beginning of the next year. **Therefore, it is tax neutral and no mala fides can be attributed to the assessee-company in view of the fact that tax rates applicable to all these years is uniform.** In any event, addition was made based on information filed by the assessee-company itself and it is not on account of any deletion made by the AO and therefore, assessee-company cannot be held to be guilty of furnishing inaccurate particulars of income and no penalty is exigible. The AO Office had not given finding in the penalty order as to how and in what manner the assessee had furnished inaccurate particulars of income resulting in additions to the returned income, except making a bald charge against the assessee that it had **furnished the inaccurate particulars, which is an essential requisite of section 271(1)(c) of the Act. In the absence of such finding, the penalty order is liable to be quashed.** Reliance in this regard is placed on the following judicial precedents the learned AO had not given finding in the penalty order as to how and in what manner the assessee had furnished inaccurate particulars of income resulting in additions to the returned income, except making a bald charge against the

assessee that it had furnished the inaccurate particulars, which is an essential requisite of section 271(1)(c) of the Act. In the absence of such finding, the penalty order is liable to be quashed. Reliance in this regard is placed on the following judicial precedents:

- (a) CIT v. Balbir Singh (2008) 304 ITR 125/(2007) 164 Taxman 65 (Punj. & Har.)*
- (b) National Textiles v. CIT (2001) 249 ITR 124/114 Taxman 203 (Guj)*
- (c) Nainu Mal Het Chand v. CIT (2007) 294 ITR 185/160 Taxman 49 (All)*
- (d) CIT v. Super Metal RE-rollers (P) Ltd. (2004) 265 ITR 82/135 Taxman 407 (Delhi)*
- (e) Diwan Enterprises v. CIT (2000) 246 ITR 571 (Delhi)*
- (f) CIT v. Shivnarayan Jamnalal & Co. (1998) 232 ITR 311/(1996) 89 Taxman 420 (MP)*
- (g) CIT v. T.Abdul Majeed (1998) 232 ITR 50/(1997) 93 Taxman 491 (Ker)*

17.1 The Hon'ble apex court in the case of Dilip N. Shroff v. Jt. CIT (2007) 291 ITR 519/161 Taxman 218 had held vide paras 56 and 57 as follows (page 546):

“The term ‘inaccurate particular’s is not defined. Furnishing of all assessment of value of the property may not by itself be furnishing of inaccurate particulars. Even if the Explanations are taken recourse to, a finding has to be arrived at having regard to clause (a) of Explanation 1 that the Assessing Officer is required to arrive at a finding that the explanation offered by an assessee in the event he offers one, was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus, apart from his explanation being not bona fide, it should have been found as of fact that he has not disclosed all the facts which was material to the computation of his income.

The explanation, having regard to the decisions of the court, must be preceded by a finding as to how and in what matter he furnished the particulars of his income. It is beyond any doubt or dispute that for the said purpose the Income-tax Officer must arrive at a satisfaction in this behalf. (See CIT v. Ram Commercial Enterprises Ltd.

[2000] 246 ITR 568 (Delhi) and Diwan Enterprises v. CIT [2000] 246 ITR 571 (Delhi).

17.2 The AO has not found the explanation furnished by the assessee in response to the show-cause notice to be false nor found to be not bona fide. Therefore, the Explanation (1) to section 271(1)(c) of the Act is not attracted and, therefore, provisions of section 271(1)(c) of the Act are not applicable as held by the Hon'ble apex court in the case of *K.P.Madhusudhanan v. CIT (2001) 251 ITR 99 (SC)* and also in the case of *T.Ashok Pai v. CIT (2007) 292 ITR 11 (SC)*, vide para 18 held as follows (page 13):

“Even if the explanation are taken recourse to, a finding has to be arrived at having regard to clause (A) of Explanation 1 that the Assessing Officer is required to arrive at a finding that the explanation offered by an assessee, in the even, he offers one was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus,

apart from his explanation being not bona fide, it should have been found as of fact that he has not disclosed all the facts which was material to the computation of his income.”

17.3 Even the Hon’ble Karnataka High Court in the case of CIT v. Sandur Manganese & Iron Ores Ltd. (2010) 327 ITR 242 has laid down the same proposition of law. The reasoning of the CIT(A) that penalty is exigible because excess stock was detected during course of search proceedings is not borne out of any material or assessment records. Therefore, the finding of the CIT(A) on this is contrary to evidence on record and cannot be accepted.

18. In the result, appeals filed by the revenue are dismissed and the cross objections filed by the assessee-company are allowed.”

3. Learned Counsel for the Revenue submitted that since the Assessee surrendered his income to taxation after a search was conducted at his business premises u/s 132 of the Act and therefore such a

surrender cannot amount to voluntary surrender and the Assessing Authority was justified in imposing penalty under Section 271[1][c] of the Act, rejecting the explanation given by the Respondent-Assessee. He has relied upon the decision of this Court in the case of **‘Commissioner of Income Tax v. Manjunatha Cotton & Ginning Factory and Others’ [2013] 359 ITR 565 [Karnataka]**, while summarizing the legal position about imposition of penalty under Section 271[1][c] of the Act, holding that such imposition of penalty is not automatic and it depends upon the facts and circumstances of the case. The Co-ordinate Bench of this Court in the case of **Manjunatha Cotton & Ginning Factory** [supra], held as under:

“Held accordingly, dismissing the appeals, (i) that merely because the assessee agreed to the addition and the assessment order was passed on the basis of this addition, when the assessee had paid the tax and the interest thereon in the absence of any material on record to show the concealment of income, it could not be inferred

*that the addition was on account of concealment. Moreover, the assessee had offered an explanation. **The explanation was not found to be false. On the contrary, it was held to be bona fide. The cancellation of penalty by the Tribunal was justified.***

(ii) That the Tribunal was justified in holding that the entire penalty proceedings were vitiated on the ground that the notice issued was not in accordance with law.

(iii) That the subject matter of the penalty proceedings was the order of the appellate authority and not the order passed by the Assessing Officer. Hence, the order of penalty by the Assessing Officer was not valid.

(iv) That when two fact finding authorities were satisfied that the explanation offered by the assessee was not false and it was a bona fide though the assessee had failed to conclusively prove the explanation the levy of penalty was not justified.”

4. The first reason for which penalty in question was imposed by the Assessing Authority in the present case was on account of the excessive deduction claimed under Section **10B** of the Act which was set

aside by the learned Tribunal, following the decision of this Court in the case of '**Commissioner of Income Tax v. Tata Elxsi Ltd.**', in **349 ITR 98**. Another ground on which the penalty was imposed by the Assessing Authority was the additions made in the income on account of alleged excess stock, holding which too was set aside by the learned Tribunal vide Paragraph-17 of the impugned order quoted above holding that the said alleged excess stock was not as a result of purchases made outside the books of accounts, but was only on account of wrong entries in the books of accounts and in any case the higher stock in trade declared as closing stock in a particular year would be taken as opening stock at the beginning of the next year and therefore the tax effect of such alleged excess stock is 'Nil' and thus it being a tax neutral entry, the learned Tribunal found that there was no concealment on the part of the Assessee, attracting penalty under Section 271[1][c] of the Act.

5. The Judgment relied upon by the learned Counsel for the Revenue in the case of **‘MAK Data [P] LTd., v. Commissioner of Income Tax – II’ [2013] 38 taxmann.com 448 [SC]** is on diagonally opposite to facts of this case. In that case on facts, it was found that there was no explanation offered by the Assessee for concealment of income of Rs.40.74 lakhs and the High Court setting aside the findings of the Tribunal, held that explanation of the Assessee when such surrender of income was made by it to buy peace or to avoid litigation was not sufficient to satisfy the Explanation-1 to Section 271[1][c] of the Act and in these circumstances upholding the order of the High Court, the Hon’ble Supreme Court upheld the imposition of penalty in that case. The relevant portion of the Judgment of the Hon’ble Supreme Court is also quoted below for ready reference:

7. The AO, in our view, shall not be carried away by the plea of the assessee like “voluntary

disclosure”, “buy peace”, “avoid litigation”, “amicable settlement”, etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

8. Assessee has only stated that he had surrendered the additional sum of Rs.40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defences under the explanation 1 to Section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the Appellant-assessee from the mischief of penal

proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

9. We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the **search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary.** AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the

amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961.

10. The AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing. The scope of Section 271(1)(c) has also been elaborately discussed by this Court in Union of India vs. Dharmendra Textile Processors (2008) 13 SCC 369 and CIT vs. Atul Mohan Bindal (2009) 9 SCC 589.

11. The principle laid down by this Court, in our view, has been correctly followed by the

17/18

Revenue and we find no illegality in the department initiating penalty proceedings in the instant case. We, therefore, fully agree with the view of the High Court. Hence, the appeal lacks merit and is dismissed.”

6. The said decision does not help the contention of Revenue before us, as there is no finding of fact before us to the effect that there was no explanation on the part of the Assessee. On the contrary, the findings of Tribunal are in favour of the Assessee.

7. We are satisfied that in the facts of the present case before us, since the Tribunal has reiterated the findings of facts that both the additions made to the income of the Assessee having been set aside following the decision of the High Court in the case of **Tata Elxsi Ltd.**, [supra] as far as issue of Section 10B is concerned and on the issue of excess stock being tax neutral, such cogent and reasonable findings of facts returned by the

learned Tribunal and consequentially setting aside the penalty under Section 271[1][c] of the Act, does not give rise to any substantial question of law requiring the consideration by this Court under Section 260-A of the Act.

8. The Appeal filed by the Revenue is thus found to be without merit and liable to be dismissed and the same is accordingly dismissed. No costs.

Copy of this Order shall be sent to the Respondent-Assessee.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

AN/-